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March 25, 2004

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VIA EMAIL & ECFS

Ms. Katherine Harris
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Cost-Sharing Implications of Secondary Markets

Ex Parte In the Matter of Promoting Efficient Use of Spectrum Through
Elimination of Barriers to the Development of Secondary Markets, Report
and Order and Further Notice of Proposed Rulemaking, WT Docket 00-230

Dear Ms. Harris:

The Personal Communications Industry Association's Microwave Cost Sharing Clearinghouse ("MWCH") is an FCC-designated entity responsible for administering obligations arising under the microwave clearing rules for the Personal Communications Service ("PCS"). After reviewing certain petitions and comments in the Secondary Markets proceeding, MWCH is submitting this *ex parte* to outline proposals for dealing with microwave cost sharing issues in the contexts of *de facto* transfer and spectrum manager leasing. As discussed below, MWCH believes that the framework outlined below is consistent with the legal obligations of lessors and lessees under the regulatory scheme adopted for spectrum leasing, as well as feasible for entities such as the MWCH to administer.

As an initial matter, MWCH advocates treating, for microwave cost sharing purposes, *de facto* transfer lessees as the FCC currently treats partitionees and disaggregates. MWCH believes the overriding principle behind *de facto* transfer leasing is that the licensee obligations follow the change in control of the leased spectrum. For example, the FCC's Spectrum Leasing Order states that "the lessee must exercise all associated responsibilities inherent in such control," and that "All of the particular service rules and policies applicable to the licensee under its license authorization – both interference and non-interference related – will apply to the lessee." In such respects, a microwave cost sharing structure that treats a lessee as an independently responsible entity appears most consistent with this philosophy. Accordingly, MWCH believes that the FCC upon reconsideration should clarify that, for lessees operating under the *de facto* transfer lease provisions of the rules:

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- (i) Lessees are required to file prior coordination notices (“PCNs”) with affected microwave licensees and with the cost sharing clearinghouse and are subject to microwave cost sharing obligations on the same basis as if the lessee were, in fact, a licensee;
- (ii) Lessees are entitled to compensation under the microwave relocation rules on an equal basis with licensees and, if a lessee intends to seek reimbursement for expenses it incurs as a result of relocating a microwave link, that lessee must file a link registration with the clearinghouse;
- (iii) A lessee is deemed to benefit from a microwave relocation if the relocated link has at least one endpoint in the market of the original license from which the lease is derived; and
- (iv) Like disaggregatees and partitionees, lessees and lessors are presumed to have addressed cost sharing as a contractual matter as between themselves and, accordingly, lessees will not trigger obligations to lessors and lessors will not trigger obligations to lessees, nor will such situations change the “N” number when a particular link is subject to *pro rata* cost sharing.

On the other hand, the MWCH believes that, for spectrum manager lessees, the same framework may not be appropriate. Specifically, in the spectrum manager leasing context, the MWCH believes:

- (i) Lessors are required to file PCNs for lessee sites with affected microwave licensees and with the cost sharing clearinghouse and are subject to microwave cost sharing obligations;
- (ii) Lessees are entitled to compensation under the microwave relocation rules on an equal basis with licensees and, if a lessee intends to seek reimbursement for expenses it incurs as a result of relocating a microwave link, that lessee must file a link registration with the clearinghouse;

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- (iii) A lessee is deemed to benefit from a microwave relocation if the relocated link has at least one endpoint in the market of the original license from which the lease is derived; and
- (iv) Like disaggregatees and partitionees, lessees and lessors are presumed to have addressed cost sharing as a contractual matter as between themselves and, accordingly, lessees will not trigger obligations to lessors and lessors will not trigger obligations to lessees, nor will such situations change the “N” number when a particular link is subject to pro rata cost sharing.

In the spectrum manager context, the original licensee, not the lessee, bears primary responsibility for most regulatory compliance actions. Under such circumstances, it appears most consistent with the FCC’s rules to continue to require the licensee (lessor) to file PCNs with affected microwave licensees and with the cost sharing clearinghouse for any site construction in their market undertaken by a spectrum manager lessee, as well as to hold the original licensee responsible for cost sharing obligations incurred under the rules.

Notably, any entity is permitted to relocate microwave links and participate in cost sharing for relocated links. Thus, a spectrum manager lessee could relocate links and register with the clearinghouse to seek reimbursement. While such registrations could be processed, the Commission should address one disparity that might arise under the rules. In particular, a relocating entity is deemed to “benefit” under the rules only if one endpoint of the microwave link lies within a market licensed to the relocater. Because, in the spectrum manager lease context, the relocater holds no licenses, the lessee will not be deemed to benefit from any relocated links, even though they may operate in a market containing one endpoint of the microwave link. In addition, the original licensee of the market may trigger an obligation to the lessee, which appears inconsistent with the rules relating to partitioning and disaggregation. On balance, the MWCH believes that spectrum manager lessees that engage in microwave relocation should be permitted to register links for cost compensation, but they should be required to notify the clearinghouse that they are spectrum manager lessees and indicate the lessor granting the lease. The rules should also clarify that a relocating entity benefits from a relocation if the microwave link has an endpoint in a market licensed to the lessor and that, consistent with the partitioning and disaggregation rules, lessors do not trigger obligations to lessees and vice versa.

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Because the regulatory treatment noted above does not seem inconsistent with the FCC's rules, the MWCH intends to post an interim spectrum leasing policy reflecting these comments on its website and ask lessors and lessees to comply as a voluntary matter for relocations and PCN filings until such time as a reconsideration and clarification order is issued by the FCC.

Should any questions arise concerning this *ex parte*, please do not hesitate to contact Eric W. DeSilva, counsel to the MWCH, at (202) 719-3182, or Christopher Holt, Operations Manager of the MWCH, at (703) 535-7501.

Respectfully yours,

Eric W. DeSilva

cc: Christopher Holt, PCIA Microwave Clearinghouse